MALAYSIAN REPORTS

PUBLIC PROSECUTOR v. YEOH TECK CHYE AND LIM HONG PUNG & ANOR. v. PUBLIC PROSECUTOR

[F.C. (Raja Azlan Shah C.J. (Malaya), Wan Suleiman & Abdul Hamid F.JJ.) February 9-12 & May 7, 1981]

[Kuala Lumpur — Federal Court Criminal Appeal No. 34 of 1979]

Penal Code, ss. 109, 408, 465 & 471 — Criminal breach of trust — Ingredients of offence — Manager of bank approving payment of cheques exceeding overdraft facility in violation of legal contract — No authority to grant short term overdrafts — Charge — Amendment of charge by trial court and by appeal court — Abetment of criminal breach of trust — Evidence of co-accused — Forgery — Whether document a false document — Documents signed with authority — Courts of Judicature Act, s. 60.

Evidence — Evidence of co-accused — Burden of proof on accused — No duty to corroborate evidence — Evidence Act, 1950, s. 30.

In this case the 2nd accused (Lim Hong Pung) was the manager of a bank and it was alleged that he had approved payment of cheques to the 3rd accused (Liew Chin Yam) although in excess of the overdraft facilities given to the 3rd accused and although the 2nd accused had no authority to give such overdraft facilities. The 2nd accused was charged with criminal breach of trust and the 3rd accused with abetment of that charge. The 1st accused (Yeoh Tech Chye) was the Deputy General Manager of the Bank, who had authority to grant overdrafts within limits and some of the cheques passed by the 2nd accused had the initials of the 1st accused in the register of cheques. He was also charged with abetment of the criminal breach of trust by the 2nd accused. The learned trial judge convicted the 2nd accused of criminal breach of trust and the 3rd accused of abetment but he acquitted the 1st accused. The Public Prosecutor appealed against the acquittal of the 1st accused and the 2nd and 3rd accused appealed against their conviction and sentences.

The 3rd accused was also charged with two charges of forgery, the allegation being that he had used false documents namely he had signed application forms to open individual accounts in the name of other persons. Accused No. 1 and No. 2 were charged with abetment. At the trial the other persons stated that they had authorised the third accused to make the applications on their behalf. The learned trial judge found the 3rd accused guilty of both charges of forgery but he acquitted the 1st and 2nd accused of abetment. The 3rd accused appealed against his conviction and sentence.

Held: (1) in this case there was evidence on which the learned trial judge could find that the 2nd accused had granted overdrafts in excess of approved overdraft facility or exceeding the credit balance, as the case may be, and that the 2nd accused had no authority to do so and therefore the finding of the trial judge that the 2nd accused was guilty on the two charges of criminal breach of trust should be upheld;

(2) although the learned trial judge on the charges amended by him held that the acts of the 2nd accused had been done in violation of the direction of law prescribing the mode in which the entrustment of property to him should be discharged, the facts showed that what was done was in breach of a legal contract touching the discharge of the trust and the Federal Court would substitute the clauses in the charges in exercise of the powers under section 60 of the Courts of Judicature Act. The substitution would not cause any injustice to the second accused;

(3) although the loan facilities granted by the 2nd accused had been ratified by the Board of Directors of the Bank, this would not exonerate the criminal offence committed by the second accused;

(4) on the evidence the 3rd accused was responsible for drawing and presenting all the cheques which had been approved by the 2nd accused for payment in excess of the limits as stated in the charges and he admitted he knew that the 2nd accused had no authority to grant the overdrafts. The learned trial judge was therefore correct in finding the 3rd accused guilty of abetment of the charge of criminal breach of trust;

(5) as against the 1st accused, the learned trial judge was entitled to take into account the evidence of the co-accused but as in this case the trial judge had acquitted the 1st accused, he would appear to have a reasonable doubt as to the allegations against the 1st accused;

(6) once the court accepted the testimony of the two prosecution witnesses that they had consented to the 3rd accused signing their names on the relevant bank documents, these documents were no longer false documents so that the charges against the 3rd accused of forgery must fail.

Cases referred to:-

(1) *Yeow Fook Yuen* v. *Regina* [1965] 2 M.L.J. 80.
(2) *Mangal Sen* v. *Emperor* A.I.R. 1930 Lah. 57.
(3) *Shanmugam* v. *Public Prosecutor* [1963] M.L.J. 125.
(4) *Abu Bakar* v. *Regina* [1963] M.L.J. 288.
(5) *R.* v. *Barnes & Anor.* 27 Cr. App. R. 154.
(6) *Kenneth Frank Vincent* v. *Reg.* (1972) 56 Cr. App. R. 281.

FEDERAL COURT.

Mohamed Noor bin Haji Ahmad (Deputy Public Prosecutor) for Public Prosecutor.

Jagjit Singh (*Manjeet Singh* with him) for 1st accused.

G. Sri Ram for 2nd accused.

R.R. Chelliah (*D.P. Vijandran* with him) for 3rd accused.

E.J. Lawrence, watching brief for Bank Buruh.

Cur. Adv. Vult.

Wan Suleiman F.J. (delivering the judgment of the Court): Yeoh Teck Chye, the respondent in the Public Prosecutor's appeal, who throughout this judgment will be referred to as accused 1, and the two appellants in the cross-appeal Lim Hong Pung referred to as accused 2 and Liew Chin Yam referred to as accused 3 respectively were jointly tried in the High Court, Kuala Lumpur.

Accused 3 was tried on two charges of forgery as follows:

"First Charge:

That you on or about 4th March, 1976 at Bank Buruh (Malaysia) Bhd., Jalan Gereja, in the Federal Territory, Kuala Lumpur, dishonestly used as genuine a certain document, to wit, a Bank Buruh (Malaysia) Bhd. Application Form to open an Individual Account, i.e. Account No. 11-1574 dated 4th March, 1976 which you had reason to believe at the time you used it to open a current account with the said Bank, to be forged document and that you have thereby committed an offence punishable under section 465 and section 471 of the Penal Code.

Second Charge:

That you on or about 10th June, 1976, at Bank Buruh (Malaysia) Bhd., Jalan Gereja, in the Federal Territory, Kuala Lumpur, dishonestly used as genuine a certain document, to wit, a Bank Buruh (Malaysia) Bhd. Application Form to open an Individual Account, i.e. Account No. 11-1897 dated 10th June, 1976 which you had reason to believe at the time you used it to open a current account with the said Bank, to be forged document and that you have thereby committed an offence punishable under sections 465 and 471 of the Penal Code."

and accused 1 and 2 with abetment thereof.

At the close of the prosecution case, the 1st and 2nd accused were both acquitted and discharged of

these abetment charges. At the close of the case of the defence, accused 3 was found guilty of both charges of forgery, against which decision he now appeals. We will come back to these two charges later.

The criminal breach of trust charges:

Accused 1 was originally charged with criminal breach of trust, and accused 2 and 3 with abetment. In the course of the trial prosecution amended the charges thrice. The third amendment is as follows:

"Against the Second Accused:

That you between 27th October, 1975 and 20th July, 1976, at the Bank Buruh (Malaysia) Bhd., Jalan Gereja, in the Federal Territory, Kuala Lumpur, being a servant in the employment of Bank Buruh (Malaysia) Bhd., to wit, its Manager, and in such capacity entrusted with the dominion over certain property, to wit, the fund of the said Bank, wilfully suffered one Liew Chin Yam to dishonestly use the said fund amounting to $4,851,676.03, the particulars of which are stated in Appendix 'A', in violation of a legal contract made touching the discharge of such trust and that you have thereby committed an offence punishable under section 408 of the Penal Code.

Against the Third Accused:

That between 27th October, 1975 and 20th July, 1976, at Bank Buruh (Malaysia) Bhd., Jalan Gereja, in the Federal Territory, Kuala Lumpur, one Lim Hong Pung, being a servant in the employment of Bank Buruh (Malaysia) Bhd., to wit, its Manager, committeed the offence of criminal breach of trust under section 408 of the Penal Code in respect of the fund of the said Bank amounting to $4,851,676.03, the particulars of which are stated in the attached Appendix, and you between the same dates and at the same place, did abet the commission of the said offence amounting to $4,851,676.03, the particulars of which are stated in the said Appendix, which offence was committed in consequence of your abetment and that you have thereby committed an offence punishable under section 109 and section 408 of the Penal Code.

Against the First Accused:

That between 27th October, 1975 and 20th July, 1976, at Bank Buruh (Malaysia) Bhd., Jalan Gereja, in the Federal Territory, Kuala Lumpur, one Lim Hong Pung, being a servant in the employment of Bank Buruh (Malaysia) Bhd., to wit, its Manager, committed the offence of criminal breach of trust under section 408 of the Penal Code in respect of the fund of the said Bank amounting to $4,851,676.03, the particulars of which are stated in Appendix 'A', and you between the same dates and at the same place, did abet the commission of the said offence amounting to $3,744,093.93, the particulars of which are stated in Appendix 'B', which offence was committed in consequence of your abetment and that you have thereby committed an offence punishable under section 109 and section 408 of the Penal Code."

It will be noted that accused 2 had by then became the principal offender and accused 1 and 3 abettors.

These charges underwent further amendment, this time at the instance of the learned trial judge, after he had heard submissions by counsel after close of the prosecution case. We set out in extenso that portion of the learned trial judge's grounds culminating in his calling upon accused No. 2 to make his defence on the two charges as amended by him:

"The following are facts which I gather from the evidence given by prosecution witnesses and from documents produced by the prosecution. The First Accused was employed by Bank Buruh as Deputy General Manager in charge of operations of the Bank. He was appointed attorney under power of attorney dated August 28, 1975. Among the powers granted to him under the instrument was power to make loans and advances on current account or any other accounts at such rate of interest and upon such security as he thought fit or without security.

The Second Accused was employed by Bank Buruh as Manager of its Kuala Lumpur Branch. He was not granted power of attorney like the one granted to the First Accused, or any power of attorney at all. Therefore he had no power to make loans or advances except such powers as I shall mention later. Among the functions which he performed at the Bank was to do checking of cheques presented to the Bank to determine whether they should be passed for payment. The procedure for checking was as follows. When a cheque drawn on an account in the Bank was presented to the Bank for payment it was sent to the Machine Operator who posted it in the account concerned. The amount of the cheque was debited in the debit column of the ledger card in respect of the account by means of the machine, and the resulting balance was shown in the balance column of the ledger card. Then the Machine Operator sent the ledger to the Subaccountant (Current Account Officer) who verified whether the drawer's signature was correct and whether the cheque had been properly drawn technically. He initialled against the debit amount in the ledger card. The instruction card is a card on which approved overdraft facilities, if any, in respect of the particular account were recorded with particulars of the approved amounts, the terms and other particulars. If the amount of the cheque exceeded $2,000 the Subaccountant sent it to the Second Accused together with the ledger card and the instruction card. If the Second Accused approved that the cheque be honoured he initialled against the balance amount in the balance column of the ledger card. Before approving he must ascertain that the drawing by means of the cheque did not exceed the limit. In the case of an account in respect of which there had been no overdraft facility approved, that limit was the balance standing to the credit in the account. Where overdraft facilities had been approved the limit was the total amount of the overdraft facilities approved at the relevant time with ten per cent tolerance. This means that the customer was allowed to draw on the overdraft account in excess of the total amount of the approved overdraft facilities to the extent of ten per cent only of the total amount of the approved overdraft facilities.

Since the Second Accused was given the function of seeing that no money was paid out without authority or in excess of the authorised limit, in fact he was thereby entrusted with dominion over the funds of the Bank. This was a trust implied by the law. Under that trust he could only pass cheques for payment within the limit. That is the direction of the law prescribing the mode in which the trust was to be discharged. In the case of overdraft facility approved subject to the condition of security being furnished, the direction of the law with regard to the mode in which that trust was to be discharged is that no overdraft could be drawn unless security had been furnished.

There were altogether 17 accounts affected by the original charge of criminal breach of trust. Ledger cards in respect of these 17 accounts were produced at the trial, and they show initials of the Second Accused against some of the balances in the balance column. This means that he had approved the relevant cheques for payment. Some of the cheques approved by him represented drawings in excess of the approved overdraft facilities, while some other drawings were approved by him in excess of the credit balance although there was no overdraft facility having been approved. Since he had no power to grant loans or authority to approve drawings in such manner, there is a prima facie case of criminal breach of trust. However, on checking the figures I find that the amount of misappropriation stated in the charge is incorrect. For this reason I have to amend the charges. There are also other reasons why the charges have to be amended.

Several overdraft facilities were approved in respect of the accounts the subject matter of these cases, subject to the condition that shares of the specified value be furnished to the Bank as securities. The prosecution alleges that the shares furnished as securities were insufficient and their value was lower than that specified in the condtion, and the prosecution therefore contends that the drawings made on the overdraft facilities were improper and that by honouring the cheques for such drawings the Second Accused committed criminal breach of trust. However, the prosecution does not adduce evidence showing separate valuation of the share securities which were provided in respect of each approved facility. Nor does the prosecution give the market price of each share counter on the relevant date to enable the court to make valuation of the share securities. The burden is on the

prosecution to prove that the share securities furnished in respect of a particular approved facility was insufficient. In the absence of the necessary evidence I have to make a finding that the security provided in respect of a particular overdraft facility was sufficient so long as there is evidence that security was furnished in respect of that overdraft facility, because the court is unable to value the security in the absence of the necessary evidence. Particulars to the amended charges prepared by the court show the overdraft facilities in respect of which the court considers securities were sufficient.

When overdraft facility was approved the terms were stated in the application for accommodation form. In respect of account No. 11-1537 overdraft facility was approved, i.e., A.A. No. 76/185, and one of the terms of approval stated in the application for accommodation form was that the overdraft should be secured by shares and stocks with a drawing margin of 60% of the market value. In respect of account No. 55-5153 overdraft facility was also approved i.e. A.A. No. 76/326, subject to the condition that the overdraft should be secured by shares and stocks with a 60% margin of the market value. Evidence shows that the Second Accused approved for payment cheques overdrawn on these accounts when the required securities had not been taken. None of the documents contained in the relevant files (Exhibits P109K and P109N) shows that securities had been furnished. Nor does the register of shares securities (Exhibit P12) show that any security had been taken in respect of these two accounts.

For the sake of clarity, in amending the criminal breach of trust charge against the Second Accused, I split it into two charges, one charge of criminal breach of trust for dishonestly disposing of the fund of the Bank by approving cheques for payment in excess of the overdraft facilities and approving other cheques for payment in excess of the credit balance where no overdraft facility had been approved; and another charge of criminal breach of trust for dishonestly disposing of the fund of the Bank by approving for payment cheques drawn on the two accounts, when no security had been taken in respect of the overdraft. I prepared a schedule in respect of each account showing detailed particulars for the charge, in which are stated the date of each relevant entry in the ledger card, the number of each cheque approved by the Second Accused in the manner stated above, the amount debited in respect of the cheque, the overdraft balance resulting from the debit, and the amount of excess of the overdraft balance over the limit as the result of approving the cheque for payment. All of the amounts of excess are totalled up.

The two amended charges of criminal breach of trust against the Second Accused as framed by the court read as follows:—

First charge

That you between 21st November 1975 and 5th July 1976 at Bank Buruh (Malaysia) Berhad, Jalan Gereja, Kuala Lumpur, in the Federal Territory, being a servant n the employment of the said Bank, to wit, Manager of its Kuala Lumpur Branch, and in such capacity entrusted with dominion over the fund of the said Bank, did dishonestly dispose of the said fund by approving for payment certain cheques drawn on the following accounts, namely current accounts No:

55-5033	11-1501
11-1224	22-2174
11-1342	11-1568
55-5076	11-1604
11-1456	11-1624

exceeding the overdraft facility or facilities approved in respect of the respective accounts, and approving for payment certain cheques drawn on the following accounts, namely current accounts No:

55-5076	11-1896
11-1456	11-1897
11-1568	11-1898
11-1574	

exceeding the credit balance in the respective accounts when there was no overdraft facility having been approved in respect of the respective accounts, in violation of the direction of law prescribing the mode in which such trust was to be discharged, and you have thereby committed criminal breach of trust of the said fund amounting to $7,269,801.36, an offence punishable under section 408 of the Penal Code.

Second charge

That you between 10th March 1976 and 11th June 1976 at Bank Buruh (Malaysia) Berhad, Jalan Gereja, Kuala Lumpur, in the Federal Territory, being a servant in the employment of the said Bank, to wit, Manager of its Kuala Lumpur Branch, and in such capacity entrusted with dominion over the fund of the said Bank, did dishonestly dispose of the said fund by approving for payment certain cheques drawn on the following accounts, namely current accounts No:

11-1567
55-5153

exceeding the credit balance in the respective accounts when there was no security having been taken in respect of the overdraft facilities approved in respect of the respective accounts, in violation of the direction of law prescribing the mode in which such trust was to be discharged, and that you have thereby committed criminal breach of trust of the said fund amounting to $643,188.99, an offence punishable under section 408 of the Penal Code."

We propose to deal with accused 2's appeal first since the trial, thenceforth, had proceeded on the basis that he was the principal offender, and indeed the appeal and cross-appeal had proceeded on that basis.

Harking back to first principles, for a person to be guilty of the offence of criminal breach of trust he should be

(i) entrusted with property or dominion over the property;

(ii) (a) that he should dishonestly misappropriate or convert it to his own use OR

(b) dishonestly use or dispose of the property or wilfully suffer any other person so to do in violation of

(iii) (a) any direction of law prescribing the manner in which such trust is to be discharged OR

(b) of any legal contract made touching the discharge of such trust.

That there was entrustment to or dominion over the property of the Bank by accused 2 was conceded by Messrs. Sri Ram and Chelliah and presumably by both counsel for accused 1. Indeed available evidence to that effect is incontrovertible. There had undeniably been a using or disposing of such property, but for the moment we need not come to any finding whether such using etc. had been done dishonestly.

Let us now examine the third ingredient at this stage. Had accused 2 indeed violated any law prescribing the mode in which his trust is to be discharged?

A government functionary holding money on behalf of his principal would for instance have precise directions of law (the Financial General Orders and the Financial Procedure Act, etc.) prescribing the manner of disposal of the money. We are however inclined to favour Sri Ram's view that no law governs or prescribes the manner in which accused 2, a bank manager, may dispose of the bank money entrusted to him as a manager. The prosecution would therefore have to prove that there had been a breach of contract (express or implied) on his part touching the discharge of the money entrusted to him, indeed prosecution would have to adduce *prima facie* evidence that accused 2 did not have authority to grant tem-

porary short term overdrafts, otherwise referred to in the trial as on-call or short term loans.

Mr. Sri Ram for accused 2 says that he should have been acquitted at the close of the case for the prosecution, that the learned trial judge had erred in finding that accused 2 had no authority to make the "short term loans", for according to counsel the evidence of prosecution witnesses would show that the accused had implied authority to make such loans, or "short term overdrafts".

Let us therefore examine in some detail the evidence which supports this argument.

Firstly there is the evidence of Zaidi, PW5, the Executive Director of the Bank. This witness said that though no power of attorney was issued to accused 2 such as those issued to him and accused 1 setting out their powers and duties, accused 2 was yet empowered to sign on behalf of the Bank. Again he said that it is the general practice for General Managers to grant temporary overdraft facilities to selected customers, that accused 2 could exercise this privilege, which is general banking practice. He enlarged on this saying that accused 2 had authority to grant temporary overdraft facility to selected customers "subject to instructions", whatever that may mean, adding that there was no ceiling to this power.

Next there is the testimony of another prosecution witness, PW16 Chow Ah Chai. This young man (26 years old at time of trial) was sub-accountant between July 1975 and September 1976. He had no positive knowledge of accused 2's powers in this respect but some of his remarks seem to imply that accused 2 had the authority to grant short term overdrafts of unlimited amount.

The learned Deputy concedes that the evidence of these two prosecution witnesses do not appear to further the prosecution case, but points out that Zaidi admits he has little personal experience of banking and was not responsible for the daily affairs of the bank i.e. was not involved in the daily workings of the bank. As regards PW16, we agree that what he says is likewise too vague to be of any importance.

The "short term" overdrafts

Because Zaidi is admittedly a person of negligible banking experience, having been a trade union official right up to the time when he became Executive Director of this bank, and PW16's patent ignorance, the only positive evidence is that of PW9, who was accountant of this bank from October 13, 1976 and promoted Manager on December 14, 1978. We agree that what he had to say about a bank manager's powers as regards short term overdrafts deserves the weight which the learned trial judge has given to it. "A temporary overdraft facility is normally given for a small amount and short duration, and it is the responsibility of the approving authority to recover the amount in the shortest possible time." says Lam. To give a Manager unlimited discretion as to the amount he may thus lend is too obviously imprudent to be banking practice and would place a bank at the mercy of any irresponsible or unscrupulous Manager, and in this particular case would make absolutely unnecessary the Power of Attorney which the Bank had issued to Zaidi and also to accused 1.

Then again, the cheques approved for payment in excess of the approved overdraft facilities, and the cheques approved for payment in excess of credit balance where there was no approved overdraft facility, in respect of 14 of the 17 accounts totalled $7,269,801.36. Those approved for payment in excess of credit balance where there was approved overdraft facility but where no security had been taken, (in another two of the 17 accounts) totalled $643,188.99. One characteristic of all these overdrafts is that though cheques were drawn and the overdrafts approved every few days, and payments to credit sometimes substantial were made from time to time, the amount overdrawn in practically all these accounts kept increasing and the various accounts remained overdrawn for periods ranging from 3 weeks to 7 months so that by no stretch of the imagination can these be termed short-term. (See page 30 Vol. I for figures).

It was never in dispute by accused 2 right from the start that those of these 17 accounts which were not in the name of accused 3 himself were being operated by the latter so that what accused 2 did was to permit a total of 208 cheques to be overdrawn by the same person, over and above the amounts which only accused 1 could lawfully approve.

The Management Committee Resolution 3 of August 28, 1975 set out the limits of accused 1's powers. It reads:

"That Mr. Yeoh Teck Chye — Deputy General Manager (Operations) of the Bank Buruh Malaysia Berhad be empowered to make loans and advances on current or any account or otherwise at such rate of interest to a sum not exceeding the amount of $50,000 (Ringgit Fifty Thousand) only at any one time as he thinks fit without demanding any security and he is further authorised to grant loans and advances to sum not exceeding at any one time or occasion $300,000 (Ringgit Three Hundred Thousand) only with proper security to any customer, person or persons, body politic or corporate firm or company."

The Executive Director together with the two Deputy General Managers could approve loans etc. up to $1,000,000 without demanding security.

The prosecution case is that because of this accused 2 had no power to grant even short term overdrafts however small. The application for accommodation by accused 3 (Exhibit P109 B10 — Vol. IV page 132) dated October 31, 1975 it was submitted, showed that at least from that date accused 2 had come to know the limits of accused 1's lending powers.

The testimony of Zaidi concerning the disapproval of the Board of Bank Buruh itself of the loans which accused 1 and 2 had approved "in excess of their powers" is yet another item of evidence which the learned Deputy says belies any claim by accused 2 that he had, or at least was led to believe by Zaidi to have, powers to grant unlimited amounts on short term overdrafts. No doubt Bank Negara Inspectors and not the Board had discovered these shortcomings, but it cannot be denied that the Board then took rapid steps to safeguard the interests of Bank by removing accused 2 from his post as Manager on July 21, 1976, to get a letter of guarantee from accused 3 and gene-

rally to place things on a proper footing.

The wording of the various minutes lend ample support to the learned Deputy's contention that both the Management Committee and the Board were in no doubt as to accused 2's lack of power to grant the so-called short term overdrafts.

In the minutes of the Board of Directors meeting of July 14, 1976 (Exhibit P25) under the heading "Interview with D.G.M. (Op)" appears this passage:

"D.G.M. was then invited to the meeting to give his explanation on a number of points raised by the Bank Negara Inspectors. Encik Yeoh Teck Chye said that he was already taking necessary action to secure additional deposits and additional deposits and additional charges from the existing clients who had been given facilities....

Encik Yeoh Teck Chye when called upon to explain how the present situation was allowed to develop, stated that he himself was not aware of the true position until it was brought to surface following the Bank Negara's inspection. The members of the Board expressed their dissatisfaction and instructed D.G.M. (Op) to review existing loan and overdraft facilities given todate *without his authority* and put the matter right without any further delay."

The Management Committee met on September 6, 1976 (see Exhibit P24) and *inter alia* examined the report of the Sub-committee appointed to review loan and overdraft facilities, took note of the recommendations of the Loan Committee and whilst endorsing them, recommended to the Board to give covering approval for the facilities in excess of the powers vested in the D.G.M. (Op) and at the same time approve the action taken to secure due documentation, etc. to cover the facilities as listed in the report.

The Board met on September 9, 1976 (see Minutes in Exhibit P25) and among other decisions, specifically approved the recommendations by the Management Committee relating to the Sub-committee's report on review of loan and overdraft facilities.

We are satisfied that this ratification by the Management Committee and the Board of Directors must *prima facie* indicate that the supreme authorities of the bank far from confirming that accused 2 had the authority to grant the short term overdrafts were merely engaged in taking steps to protect the bank's interest, and to make the best out of a bad bargain, and possibly to regain the confidence of Bank Negara.

As regards the effect of ratification on criminal liability two authorities were brought to our notice viz. *Yeow Fook Yuen* v. *Regina*[1] and *Mangal Sen* v. *Emperor*.[2] From these authorities we are satisfied that ratification would not exonerate a criminal offence and no authority we are aware of or which has been brought to our notice says otherwise.

We therefore hold that the act of ratification is of no assistance to the defence.

In amending the charges against accused 2 before calling upon him to make his defence the learned trial judge had taken the view that his granting of overdrafts in excess of approved overdraft facility, or exceeding the credit balance where no overdraft facility had been approved in respect of the two accounts mentioned in the second charge, had been done in violation of the direction of law prescribing the mode in which this entrustment may be discharged. We think with respect that for the words "the direction of law prescribing the mode in which such trust was to be discharged" in each instance, there should be substituted the words "of any legal contract made touching the discharge of such trust", for *prima facie*, we would say that there is at the very least an implied legal contract governing the manner in which accused 2 was authorised to dispose of the funds of the bank.

That there had been wrongful loss to the bank may be a matter of some doubt but that there had been wrongful gain to accused 3 in that he had obtained easy loans for his business and share buying ventures there can be no doubt. To allow such wrongful gain must *prima facie* be the intention of accused 2 in facilitating the opening of the 17 accounts and in subsequently allowing the numerous overdrafts.

The substitution of the clauses earlier mentioned in both charges in the exercise of the powers of the court under section 60 of the Courts of Judicature Act would not in our view occasion any injustice because the substance of accused 2's defence was that he had implied authority to make the overdrafts that he granted and in respect of 2nd charge, he had sufficient securities but staffing problems prevented him from making appropriate entries into the share register.

This defence if believed would be a complete answer to both the charges as amended by us. We are equally satisfied in the circumstances, that such substitution would not do any injustice to the other two accused charged as they were with abetment of the offences allegedly committed by accused 2.

Turning now to the defence, we note that the learned trial judge did not accept accused 2's claim that he had the power to grant on-call loans or short term overdraft facilities unlimited in amount, and he gave what we consider reasons which are more than adequate why he remained in no reasonable doubt of accused 2's guilt. Clearly he accepted the testimony of PW9, the only bank official of sufficient standing and experience among the prosecution witnesses, when he said evidence shows that a temporary overdraft facility is an overdraft facility of a reasonable amount to be regularised within a short period, granted in expectation of sufficient payments coming into the credit of the account, he was echoing the words of PW9 Lam Yik Meng.

Mr. Sri Ram for accused 2 categorises the 17 accounts as (1) those where he sought long term loans for his Malacca and other property projects and (2) short term loans which he took to purchase shares from the share market. One glance at the list of "short term overdrafts" will show that the "short term" loans were taken on 16 out of the 17 accounts. Whilst accused 3's testimony if completely true would give the impression that there was no concealment by both accused 1 and 2 of their powers, the very fact that eight of these accounts were opened with the avowed purpose of obtaining short term loans indicates that they were designed to enable accused 3 to circumvent the limitations to accused 1's powers set out in Resolution No. 3. This "spreading out of

accounts" would certainly not have been viewed with approval by the Board and the Management Committee.

Accused 1 of course acknowledges that accused 3 saw him only in connection with 10 of the 17 accounts but adds that he was unaware all the time accused 3 was operating all the accounts, or that it was made on his advice so that he could act within his powers and grant long term overdrafts.

Thus whilst accused 2 and 3 said that accused 3 had seen accused 1 first every time he opened each of 17 accounts, accused 1 as we have noted categorically denies this. Accused 2 however admitted to knowledge that accused 3 was operating all 17 accounts.

The learned trial judge considered with great care the defence of accused 2 and found him guilty on both charges of criminal breach of trust.

In connection with his Lordship being unable to believe accused 2's claim that, having been told by Zaidi, on the occasion of receiving his letter of appointment, "as far as possible to run the branch as he had been doing when he was a manager in Malayan Banking until receipt of further instructions", he assumed that he had the power to grant loan on call of unlimited amount, which he claimed he had whilst manager of Malayan Banking branch, the learned trial judge remarked "The second accused did not call any officer from Malayan Banking to corroborate his evidence."

This passage was criticised as having imposed on the accused 2 a burden he should not be called upon to bear. Two authorities, *Shanmugam* v. *Public Prosecutor*[3] and *Abu Bakar* v. *Regina*[4] were cited to support a proposition which is indeed settled law that it is a misdirection in law to require an accused person to corroborate his story. However, having considered the context in which the sentence set out above appears, it is evident that his Lordship was not engaged in the exercise of directing himself that corroboration of accused 2's evidence was required at law. He was merely giving reasons, as a judge indubitably is entitled to do, why on the evidence before him he is unable to accept that the vague and general terms of the words Zaidi had allegedly used gave accused 2 the power to grant these loans on call of unlimited amount. The words which followed are even more significant. In saying "As a bank manager the second accused must have known that to confer powers of granting loans on call of unlimited amount would require a grant of the powers in clearer and more specific words than the vague instruction alleged to have been given by Encik Zaidi" it is plain that the learned judge was satisfied that accused 2 did not even have reasonable belief Zaidi had intended to allow him to continue exercising the power to lend he claims to have had when he worked in the Malayan Banking.

Regarding the 2nd charge the learned trial judge was criticised for equating negligence with dishonesty. It was urged upon us that evidence at the very most showed that accused 2 had been negligent in keeping records because of lack of trained staff. However there is ample evidence to support the learned judge's finding. He gave one example how accused 2 could have overcome the difficulty if he had sincerely intended to keep a proper record of securities. In short he had directed his mind to the question of accused 2's intention, had viewed his alleged haphazardness in a different light and had decided that the deviation from banking practice, in not taking security, was deliberate rather than accidental, in keeping with the general scheme of allowing accused 3 access to easy loans.

We would therefore uphold the finding of the court below on the two charges of criminal breach of trust against accused 2.

As regards accused 3, the learned trial judge found on the evidence adduced by the prosecution that he was responsible for drawing and presenting all the cheques which had been approved by second accused for payment in excess of the limits as stated in the charges, and called him to make his defence on the two charges of abetment of the second accused.

Accused 3 was aware as he admitted that accused 2 had no power to grant long term overdrafts and of the limits of accused 1's powers of lending. According to him, the idea of having multiple accounts, suggested by accused 2 had the concurrence of accused 1. Taking into account the evidence as a whole, we would agree with the learned judge's grounds for finding accused 3 guilty on both charges of abetment of the charge of criminal breach of trust. What caused the learned trial judge to call upon accused 1 to make his defence is set out briefly in his judgment, we quote:

"In the case against the First Accused the prosecution relies on his initials appearing in the register of cheques Exhibit P195 and on his initials appearing on certain cheques to show that he was aware of the excesses and intentionally refrained from taking steps to prevent the drawings in excess. In order to show that First Accused's motives for doing favours to the Third Accused the prosecution alleges that the Third Accused paid for certain shares which were bought by the First Accused's son named Allan Yeoh. The prosecution also alleges that the Third Accused paid for the cost of a Jaguar car bought by the First Accused. The prosecution adduced evidence to support these allegations. Hence the following two charges were framed by the court against the First Accused by way of amendment to the one preferred by the prosecution:—"

The court then proceeded to amend the charges so that accused 1 thereafter faced the two counts of abetment of the criminal breach of trust charges against accused 2.

The learned Deputy's appeal against acquittal was based on three grounds. The main complaint is that nowhere in his judgment did the learned judge consider those parts of the evidence of accused 2 and accused 3 which implicated accused 1. (See Vol. III Ppg. 995/1000).

It is well settled law that where prisoners are tried jointly, and one of them gives evidence on his own behalf incriminating a co-prisoner, the prisoner who has given the incriminating evidence is not placed in the position of an accomplice, nor does the rule of practice with regard to the corroboration of an accomplice apply to such a case, for that rule applies only to witnesses called for the prosecution — see

R. v. *Barnes & Richards.*[5]

Section 30 of the Evidence Act, in substance says the same thing i.e. that the court may take into account such incriminating evidence against a co-prisoner.

We were referred to numerous passages in accused 3's evidence which it was argued showed that accused 1 knew, and approved of the manner in which the accounts had been spread out so as to enable him to keep the overdrafts within accused 1's powers of approval. In particular we were referred to his cross-examination by the learned Deputy in which accused 3 alleges that he had mentioned to accused 1 accused 2's advice to him to spread out the accounts.

We were also referred to several passages in accused 2's testimony the effect of which if believed would tend to confirm accused 3's evidence in this regard. In particular these passages indicate that the procedure followed by accused 3 in opening accounts was always the same. He would first see accused 1, who would then send for accused 2 to tell him of the opening of the account and approval of the facility. Accused 2 would also be asked to attend to such documentation as was necessary. Accused 2 himself testified that he had discussed with accused 1 the fact of accused 3's opening the 17 accounts.

Our attention was also drawn to passages in accused 2's evidence which indicated that accused 1 was aware accused 2 had allowed accused 3 to draw in excess of approved amount and had not tried to prevent it.

Accused 1 took a different stand. He said that only in the early stages did accused 2 refer the granting of overdraft facilities to him. Other than the items where there were his initials in two accounts, he had nothing to do with the excess of drawings in the 17 accounts.

He said that accused 3 saw him on ten occasions in all in respect of ten accounts. In respect of accounts other than his personal account accused 3 had not told accused 1 that the facility was required for his own use, accused 1 emphasised. He maintained that accused 2's allegation that accused 3 had seen him about all the 17 accounts before they were opened was untrue.

It will be incorrect to say that no mention at all was made in the judgment about what the other accused had to say of Yeoh's part in these transactions. The learned judge did refer to accused 3's account of having discussed, at accused 2's suggestion, the whys and wherefores of his "spreading out the accounts" with the first accused and the latter's approval. He then decided that "no matter whether he had opened the various accounts as the result of advice by the second accused or of the first accused or of any body", that would not exonerate third accused from dishonesty.

Whether he regarded that item of evidence as true or false is indeed not apparent from his judgment.

Could it be that the learned trial judge rejected altogether or was at least in reasonable doubt as to the truth of these allegations against Yeoh? We will not be in a position to be certain unless we order that he be retried, a course which will entail yet another marathon prosecution. After anxious consideration, we have agreed that such a course will not serve the interests of justice.

We therefore dismiss the appeal against the acquittal of the first accused, lodged by the Public Prosecutor.

It would perhaps not be inappropriate for us to add that but for a kindly Providence and the vigilance of a paternal Bank Negara, yet another fledgeling Bank would have come to grief, the victim of "pagar makan padi".

The forgery charges against accused 3:

These two charges relate to the application forms for the opening of current accounts. Exhibit P109 J1 (Vol. IV Pg. 197) which relates to Loh Teck Yan PW28 and Exhibit P109S (Vol. IV Pg. 21), that of Chin Kien Fah PW31. It is not disputed that both documents were signed by accused 3 in the names of PW28 and PW31 respectively. There is evidence that both consented to or authorised accused 3 to open and operate accounts in their names.

The Deputy Public Prosecutor failed in his attempt to impeach their credit, and the learned trial judge found that what they had said in court about the consent which they had given to accused 3 to sign their names on the application forms was the truth.

Section 463 of the Penal Code reads:

"Whoever makes any false document or part of a document, with intent to cause damage or injury, to the public or to cause any person, or to support any claim or title, or to cause any person to part with property or to enter into any express or implied contract, or with intent to commit fraud or that fraud may be committed, commits forgery."

In view of the finding of the learned trial judge, did the accused make false documents? Section 464 of the Penal Code reads:

"A person is said to make a false document — First. — Who dishonestly or fraudulently makes, signs, seals or executes a document or part of a document, or makes any mark denoting the execution of a document, with the intention of causing it to be believed that such document or part of a document was made, signed, sealed or executed by or by the authority of a person by whom or by whose authority he knows that it was not made, signed, sealed or executed, or at a time at which he knows that it was not made, signed, sealed or executed;"

Mr. Chelliah indicated two passages in the judgment which in his submission show that the learned trial judge had misdirected himself on a point of law, which we quote:

"What is really important is the nature of the representation which the accused intended to make to the Bank. I find that when he presented to the Bank the relevant documents on which he had signed the name of PW28, the third accused impliedly represented to the Bank that they had been signed by PW28 himself so that the account would be opened in the name of PW28."

"As I had already shown, it is not material whether the witnesses had given consent for the Third Accused to sign their names on the application forms because Third Accused's intention was to represent to the Bank that the applications to open account had been made by the witnesses themselves and that he had nothing to do with them."

We would respectfully agree with counsel. Once the court accepts the testimony of the two prosecution

witnesses that they had consented to the third accused signing their names on the relevant bank documents, these documents are no longer "false documents" so that both charges against him must fail.

We need only refer to one of the authorities cited by Mr. Chelliah to support his contention, *Kenneth Frank Vincent* v. *Reg.*[6] The accused in that case, who was *inter alia* charged with the offence of forgery (the English law in respect of this offence being substantially the same as ours), had bought a van from a certain firm, and had himself signed the order form for the van, addressed to the firm, in the name of his brother Keith Vincent, with his brother's consent.

In delivering the judgment of the court, Roskill L.J. said, at page 290:

"As I have already said, the first question this court has to consider is: was this a false document? Quite plainly, in the view of each member of this court, it was not a false document in that there was nothing in it that was false. The starting-point of the offence of forgery under the statute must be found in the language of the statute itself. Section 1 defines forgery as the making of a false document in order that it may be used as genuine. That, of course, is in subsection (1). Subsection (2) goes on: 'A document is false within the meaning of this Act if the whole or any material part thereof purports to be made by or on behalf or on account of a person who did not make it nor authorise its making.' Pausing there for one moment, one has only, as this court thinks, to read those words to see how the Crown failed to begin to prove that this document was a forgery because it was a document, as I have already emphasized, which was authorised by the person on whose behalf it was made. The appellant signed Keith's name and did it with Keith's authority. Therefore, in the view of this court, this document, however dishonest the purpose for which it was brought into existence, was not a false document within section 1(2) of the Forgery Act 1913."

The learned trial judge's remark about the implied misrepresentation by the third accused might be a relevant ingredient to the offence of cheating, and indeed the learned Deputy suggested if we understand him aright that this court could under section 60 of the Courts of Judicature Act amend the charges to charges of cheating, and presumably, on the evidence convict him on the amended charges.

We do not think we should do so, or indeed exercise our powers under that section in any other way, and would accordingly allow the cross-appeal by the 3rd accused and quash the conviction and sentence imposed on him on the two counts of forgery.

Order accordingly.

Solicitors: *Jagjit Singh & Co.; Ng Ek Teong & Partners; R.R. Chelliah & Bros.; Lawrence & Joseph.*

MALAYAN COMMERCIAL BANKS ASSOCIATION v. NATIONAL UNION OF BANK EMPLOYEES

[F.C. (Lee Hun Hoe C.J. (Borneo), Abdul Hamid F.J. & Abdoolcader J.) March 23 & May 7, 1981]

[Kuala Lumpur Federal Court Civil Appeal No. 16 of 1979]

Administrative Law — Certiorari — Application to quash award of Industrial Court — Industrial Court had not acted in excess of jurisdiction.

Industrial Law — Retiring benefits — Award of Industrial Court — Not made in excess of jurisdiction — Certiorari does not lie.

In this case the parties had reached agreement on all terms except on retirement benefits. The Minister referred the matter to the Industrial Court which was asked to determine the formula for computation and quantum of retirement benefits payable to employees within the scope of the collective agreement. After hearing the parties the Industrial Court considered that the computation formula and quantum as provided in the previous collective agreement should stand and made an award accordingly. On application to the High Court the learned Judicial Commissioner quashed the award and issued an order of *certiorari*. The appellant appealed.

Held: the Industrial Court had not acted in excess of jurisdiction in this case and the order of *certiorari* must be set aside and the award of the Industrial Court restored.

Cases referred to:-

(1) *The Queen* v. *Marsham* [1892] 1 Q.B. 371.
(2) *Re Arundel Justices, Ex parte Jackson* [1959] 2 All E.R. 407.
(3) *R.* v. *Surrey Quarter Sessions* [1962] 1 All E.R. 825.
(4) *South East Asia Fire Bricks Sdn. Bhd.* v. *Non-Metallic Mineral Products Manufacturing Employees Union & Ors.* [1980] 2 M.L.J. 165; [1980] 2 All E.R. 689.
(5) *Mak Sik Kwong* v. *Minister of Home Affairs, Malaysia (No. 2)* [1975] 2 M.L.J. 175.
(6) *In re Racal Communications Ltd.* [1980] 2 All E.R. 634, 640.
(7) *Anisminic Ltd.* v. *Foreign Compensation Commission* [1969] 2 A.C. 147.
(8) *Pearlman* v. *Keepers and Governors of Harrow School* [1979] Q.B. 56.
(9) *Malayan Pineapple Co. Sdn. Bhd.* v. *Food Industry Employees Union* [1976] 2 M.L.J. 23, 24.
(10) *National Association of Local Government Officers* v. *Bolton Corporation* [1943] A.C. 166.

FEDERAL COURT.

S.D.K. Peddie for the appellant.

Sri Ram for the respondent.

Cur. Adv. Vult.

Lee Hun Hoe C.J. (Borneo) (delivering the judgment of the Court): This is an appeal against the decision of the learned Judicial Commissioner in granting an order of *certiorari* and quashing the award of the Industrial Court.

Briefly, the facts are as follows. In 1960 the respondent and a Committee of the Banks entered into an agreement on retirement benefits for the Bank employees. At that time appellant was not formed yet. The formula and quantum of retirement benefits under the agreement were based on 77½% of last drawn salary multiplied by the number of years of service less any sum paid in excess of the statutory contribution to the Employees' Provident Fund ("E.P.F."). In 1966 a dispute arose between the appellant and the respondent concerning the scope of